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Federal Communications Commission

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Summary

GAF Broadcasting Company, Inc. ("GAF"), the licensee of WNCN(FM), New York, NY, herein opposes the January 17, 1992 Petition For Leave To Amend filed by The Fidelio Group, Inc. ("Fidelio").

GAF filed a timely Petition To Deny Fidelio's application, which is mutually-exclusive with the application for renewal of WNCN, on November 19, 1991 ("GAF's Petition"). GAF's Petition demonstrated that the Fidelio application was unacceptable for filing because its antenna proposal would violate the Commission's RF radiation guidelines, minimum coverage requirements and/or grandfathered short-spacing limitations. Simultaneously with the filing of its Opposition to GAF's Petition, Fidelio filed its Petition For Leave To Amend ("Fidelio's Petition") which, if granted, would sharply raise the height of its proposed antenna on the Chrysler Building by 128 feet, or roughly 12 stories, change technical parameters, and submit extensive new information concerning its technical proposal.

Initially, Fidelio's Petition must be denied because it seeks to cure fatal acceptability defects in response to GAF's Petition long after the absolute deadline for curative amendments. Fidelio's claim that its amendment is "little more than a 'housekeeping' matter" which will have "virtually no effect on any aspect" of its application is completely undermined by Fidelio's own Opposition to GAF's Petition. which largely

relies upon its amended rather than existing proposal to claim that its application is now acceptable. In this context, Fidelio's claim that the need to amend its application (and specify an acceptable technical proposal) resulted from a miscommunication with a building engineer while preparing its application is, to say the least, highly suspect.

Even if the FM processing rules did not prohibit the filing of untimely amendments to cure acceptability defects, Fidelio's

~~Petition must be denied because there is no real cause for it.~~

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defects in its application long after the absolute deadline for doing so. Even were its effort to save itself from dismissal not untimely, Fidelio utterly fails to show requisite good cause for acceptance of its amendment. The amendment must therefore be rejected.

I. BACKGROUND.

Fidelio filed its application on May 2, 1991. The Commission announced its acceptance for tender on July 3, 1991, Report No. 15030, and acceptance for filing on October 15, 1991, Report No. NA-152.^{2/} GAF filed a timely Petition To Deny Fidelio's application on November 19, 1991 ("GAF's Petition").^{3/} GAF's Petition demonstrated that the Fidelio application was patently in violation of several Commission rules, and was thus unacceptable for filing:

- First, based on FCC-accepted calculation methodology, RF radiation from Fidelio's proposed site would exceed the Commission's guidelines for human exposure.
- Second, Fidelio's application failed to demonstrate that its proposed 3.16 mV/m contour would comply with the minimum coverage requirements of Section 73.315(a) of the FCC rules, because the shielding or other

^{2/} Under the Commission's Rules, an application inadvertently accepted for filing may subsequently be found unacceptable and rejected. See 47 C.F.R. Secs. 73.3564(b), 73.3566(a).

^{3/} GAF requests that its Petition, which is summarized herein, be incorporated by reference.

corrective measures necessary for Fidelio to meet the RF radiation guidelines would effectively limit Fidelio's coverage to less than 80% of New York City.

- Third, Fidelio's proposed facility could not achieve the requisite coverage without violating Section 73.213(a) of the Commission's rules, by exacerbating WNCN's pre-existing "grandfathered" short-spacing to other stations.
- Fourth, Fidelio's application is defective because it proposes to locate its antenna on the Chrysler Building in New York City, which is significant in both history and architecture, and listed on the National Register of Historic Places, without disclosing this fact to the Commission and submitting the environmental assessment required by the FCC's rules.

Simultaneously with the filing of its Opposition to GAF's Petition, Fidelio filed its Petition For Leave To Amend ("Fidelio's Petition"). According to Fidelio's Petition, it has been "brought to Fidelio's attention" that the antenna height proposed in its application does not "accurately reflect" the location on the Chrysler Building which is available to it, "apparently" due to "some miscommunication" between the Building's and Fidelio's engineers. Fidelio Petition at 1-2. Fidelio disingenuously characterizes its amendment as "little more than a 'housekeeping' matter," filed to "adjust" its proposed antenna height, which will have "virtually no effect on any aspect" of its application. In fact, the amendment not only seeks to change antenna height, effective radiated power, and other technical parameters, but also adds extensive new information to Fidelio's technical

proposal in an effort to correct the flaws in that proposal. Fidelio's amendment is an untimely, unauthorized, and unjustified attempt to cure the acceptability defects shown by GAF's Petition.

II. FIDELIO CANNOT SEEK TO CURE ACCEPTABILITY DEFECTS
IN ITS APPLICATION LONG AFTER THE DEADLINE FOR
CURATIVE AMENDMENTS.

Initially, Fidelio's Petition must be denied because it seeks to cure fatal acceptability defects long after the absolute deadline for curative amendments. Pursuant to the FM processing rules, 47 C.F.R. Sec. 73.3564(b) and 73.3566(a), amendments which go to an application's acceptability (*i.e.*, its "compliance with the technical requirements for FM facilities"), must be filed during the 30-day period following public notice of acceptance for tender. "To permit curative amendments after that period poses too great a threat to the orderly functioning of [the Commission's] new processing procedures." FM Application Processing, 58 RR 2d 776, 784-85 (1985). Accordingly, Fidelio was not entitled to seek to cure any acceptability defect after August 2, 1991. Its amendment is more than five months late.

Fidelio's amendment is obviously not just a housekeeping matter or informational filing, as it claims. If accepted, the amendment would sharply raise the height of Fidelio's proposed

antenna on the Chrysler Building by 128 feet, or roughly 12 stories, from 699 feet to 827 feet above ground. Moreover, Fidelio's "housekeeping" claim is completely undermined by Fidelio's own Opposition to GAF's Petition, which relies upon the amendment to argue that its application is now acceptable. Thus, Fidelio's Opposition claims that its antenna is not likely to cause excessive exposure to RF radiation because, under its amended proposal, the nearest offices would be four floors away. Further, it claims that RF radiation corrective measures which would have produced a distorted signal are no longer likely to be necessary. While styled as a minor correction, Fidelio's proposed amendment goes beyond this to address the fatal technical defects raised by GAF's Petition. In this context, Fidelio's claim that the need to amend its application (and specify an acceptable technical proposal) resulted from a miscommunication in preparing its application is, to say the least, highly suspect. In any event, however, its amendment must be rejected as an untimely attempt to cure acceptability defects.

The Commission has repeatedly rejected similar late efforts to remove acceptability defects. In Emmy Hahn Limited Partnership, 4 FCC Rcd 8336, 67 RR 2d 263 (1989), the Commission dismissed as unacceptable for filing an FM application which proposed a short-spaced transmitter site

without an appropriate waiver request, and rejected an untimely curative amendment proposing a new site:

To decide otherwise would threaten the integrity of the FM processing procedures and would be unfair to those applicants in this proceeding.

not justify acceptance of a late filed amendment designed to cure that defect. If this were the case, any applicant could easily circumvent the amendment procedures set forth in our Rules by claiming that it was ignorant as to the defects in its application. 65 RR 2d at 29.

Next, the Commission rejected the claim (made as well by Fidelio) that an amendment was necessary pursuant to Section 1.65 of the rules to maintain accuracy and completeness of the application:

We also reject the petitioners' attempt to invoke § 1.65 of the Rules in filing their late amendments. . . . This Rule does not . . . require the acceptance of such amendments when, as in the instant case, they cure an acceptability or grantability defect in the underlying application and the period for filing curative amendments as of right has already lapsed. . . . Section 1.65 and § 73.3522 are complementary, not conflicting rules and we will not allow applicants, under the guise of a § 1.65 reporting amendment, to circumvent deadlines established for the filing of curative amendments per § 73.3522. 65 RR 2d at 29 (emphasis added).

III. THERE IS NO GOOD CAUSE FOR THE ACCEPTANCE OF ANY PART OF FIDELIO'S AMENDMENT.

Even if the FM processing rules did not prohibit the filing of untimely curative amendments, Fidelio's Petition must be denied because there is no good cause for the acceptance of its amendment. Pursuant to Section 73.3522(a)(6) of the FCC rules, FM applications may be amended after the 30-day period following acceptance for tender and prior to designation only upon a showing of good cause for late filing. 47 C.F.R. Sec. 73.3522(a)(6). But Fidelio has not satisfied the good cause requirements. Acceptance of the proffered amendment would unfairly advantage Fidelio and prejudice the other applicants. Moreover, Fidelio's amendment is purely voluntary, foreseeable and, at best, necessitated by its own carelessness. In these circumstances, amendments are not accepted. Erwin O'Conner Broadcasting Co., 22 FCC 2d 140, 18 RR 2d 820, 824 (Rev. Bd 1970).

A. Fidelio's Amendment Would Unfairly Advantage Fidelio And Prejudice The Other Applicants.

First, Fidelio's amendment seeks to advantage that applicant by attempting to cure the fundamental technical defects in its proposal detailed by GAF's Petition. Incredibly, Fidelio asserts that "GAF's allegations were themselves unrelated to the issue of Fidelio's proposed antenna height." Petition at 2. In fact, the height of Fidelio's proposed

antenna is directly and significantly related to the defects shown by GAF. For example, GAF demonstrated that Fidelio's proposed antenna was located too close to occupied offices to satisfy RF radiation exposure guidelines. In turn, the corrective measures required to protect against such exposure would produce a distorted signal pattern in violation of the FCC's coverage and/or grandfathered short-spacing requirements. Fidelio now proposes to raise its specified antenna height 128 feet. Indeed, the fact that Fidelio's Opposition to GAF's Petition relies mainly on its "adjusted" antenna height

Statement D at 2. Fidelio's amendment also includes for the first time repeated references to broadcast antennas formerly located on the building, in an effort to bolster the arguments in its Opposition as to why its proposal would not require an environmental assessment or have an adverse environmental impact. Fidelio Amendment, Statement D at 1-2. Even if Fidelio could prove that the Chrysler Building's engineers failed to communicate the correct tower site to its engineers, there is absolutely no justification for its submission of additional information in an attempt to rebut GAF's Petition.

Acceptance of Fidelio's amendment would also prejudice the other mutually-exclusive applicants in this proceeding, including GAF. Emmy Hahn Ltd Partnership, 67 RR 2d at 264.

B. Fidelio's Amendment Was Neither Involuntary Nor Unforeseeable.

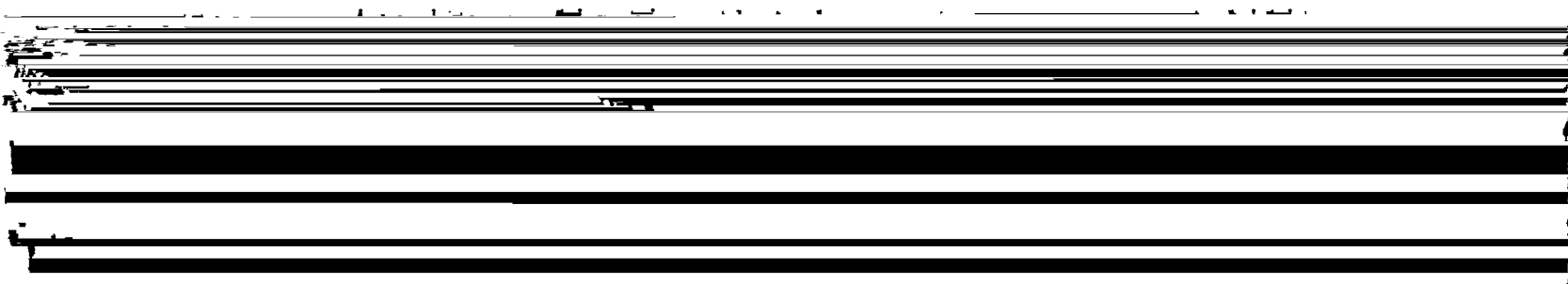
Fidelio claims that its amendment was unforeseeable and "necessitated by the unintended error apparently resulting from a miscommunication" between engineers, rather than its own voluntary actions. Fidelio Petition at 2. Unfortunately, the sketchy information it provides not only fails to establish good cause, but raises questions about Fidelio's own actions.

Fidelio's entire explanation rests on the purported notes of its consulting engineer, William P. Suffa, from his conversation with a Chrysler Building engineer. According to Mr. Suffa's declaration, his notes from that conversation

"indicate" that (1) the engineer advised Mr. Suffa that antenna space was available at heights of approximately 680 to 700 feet, and (2) Mr. Suffa "indicated" to the engineer that Fidelio would propose an antenna height of 700 feet. Fidelio Petition, Attachment C, at 1-2. In another declaration, Fidelio's principal, T'ing Pei, claims that months later, in gathering information for Fidelio's Opposition, he spoke to the building manager and determined that the height specified was "likely inaccurate." Several days later, the building manager purportedly advised him that the space "which would be available" was at 252 meters (827 feet) above ground. Fidelio Petition, Attachment B, at 1-2.

Fidelio does not submit Mr. Suffa's notes. Nor does it submit declarations from either of the building officials it claims to have talked to. Nor does Fidelio report the recollection of two other individuals who were purportedly parties to that conversation, Fidelio's former legal counsel and another engineer.

This vague, incomplete and self-serving story does not establish good cause. Ignorance of defects does not justify an untimely amendment. PrimeMedia Broadcasting, Inc., supra. Fidelio's explanation reveals, if anything, carelessness in



it now seeks to propose. If Fidelio is to be believed, it was roughly 12 stories off in specifying the location of its antenna on the Chrysler Building.^{4/} Moreover, the fact that Fidelio conveniently invokes the new, higher antenna location as the basis to try to cure the defects in its application makes its explanation highly suspect.

Fidelio's explanation raises more questions than it answers about who was responsible for the error in its application. For example, T'ing Pei certified in Fidelio's application that reasonable assurance of the proposed site had been obtained from William Bassett, the building manager for the Chrysler Building. Yet it does not appear from the declarations supporting Fidelio's Petition that T'ing Pei himself, in preparing Fidelio's application, ever spoke with the building manager (or even a building engineer) concerning any sites on the building which might be available or the actual site Fidelio would propose. Further, it does not appear that after the engineers' initial conversation, Fidelio ever sought to verify the information allegedly provided by a building engineer. Nor does it appear that Fidelio ever

^{4/} Fidelio also did not realize its error until more than six months after its application was filed, and then only in the course of preparing its response to GAF's Petition. Fidelio did not "act with due diligence," one of the other criteria for establishing good cause. Erwin O'Conner, 22 FCC 2d at 143.

confirmed the availability of the site it would propose, either in further conversations with building representatives such as Mr. Bassett or in written form such as an option agreement or even a simple letter. Instead, Fidelio apparently prepared its proposal relying only upon the notes of its consulting engineer from an initial conversation.



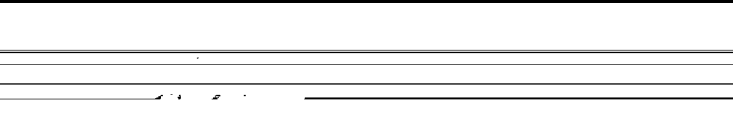

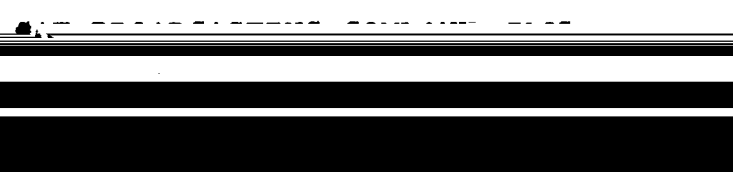
It is clear from Mr. Pei's lack of involvement and Fidelio's failure to follow up upon or verify crucial information to be specified in its application that Fidelio did not exercise reasonable care in selecting its proposed site and preparing that application. It is not surprising, therefore, that the site selected is defective. Given that lack of care, however, it cannot be said that the need to amend Fidelio's application was unforeseeable or involuntary. The vague details that Fidelio does provide about its site selection process completely undermine its claim as to good cause.

IV. CONCLUSION.

The Commission must deny Fidelio's Petition For Leave To Amend as untimely, unauthorized and unjustified. First, the FM processing rules prohibit the filing of an amendment that attempts to rectify acceptability defects at this late date. Second, even if this were not the case, Fidelio has failed to demonstrate good cause for the acceptance of its amendment.

WHEREFORE, it is respectfully submitted that Fidelio's
Petition For Leave To Amend must be denied and its application
returned as unacceptable for filing.

Respectfully submitted,



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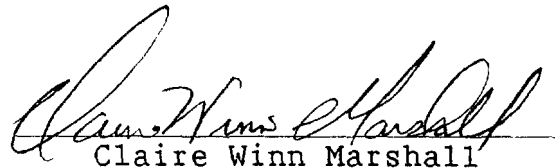
I, Claire Winn Marshall, a secretary with the law firm of Fleischman and Walsh, P.C., certify that on this 20th day of February, 1992, the foregoing "Opposition To Petition For Leave To Amend" was sent via first-class mail, postage prepaid, to the following:

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